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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

14
15 CYBERSitter, LLC, a California
limited liability company, d/b/a Solid
Oak Software,

16
17 Plaintiff,

18 v.

19 The People's Republic of China, *et al.*,

20 Defendants.

Case No. CV10-0038 JST (SH)

**DEFENDANT ZHENGZHOU JINHUI
COMPUTER SYSTEM
ENGINEERING LTD.'S REPLY IN
SUPPORT OF ITS MOTION TO
DISMISS FOR LACK OF PERSONAL
JURISDICTION PURSUANT TO
RULE 12(b)(2)**

*[Filed concurrently With Evidentiary
Objections To Declarations Filed In
Support Of Plaintiff's Opposition,
Objections To Plaintiff's Request For
Judicial Notice, Declarations Of Jeffrey
Liao and Certified Translator]*

Hon. Josephine Stanton Tucker

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Crtrm.: 10A

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1 **I. INTRODUCTION**

2 It is abundantly clear from the pleadings and plaintiff CYBERSitter, LLC's
3 ("CYBERSitter") Opposition to this Motion to Dismiss that there are insufficient bases
4 for this Court to exercise personal jurisdiction over Defendant Zhengzhou Jinhui
5 Computer System Engineering Ltd. ("Jinhui"). First, on the issue of personal jurisdiction
6 based on the Court's general jurisdiction over a party doing business in the forum,
7 CYBERSitter has now conceded (Dkt. No. 159 at 8) that it "does not allege that this
8 Court has general jurisdiction." Second, as to the issue of specific jurisdiction,
9 CYBERSitter offers no evidence to show that Jinhui, a Chinese company doing business
10 only in China, has had any contact with California at all, much less contacts sufficient to
11 establish personal jurisdiction consistent with notions of fair play and substantial justice.

12 CYBERSitter asserts two so-called facts in an attempt to show that Jinhui, a
13 company operating exclusively in China, is somehow "targeting" CYBERSitter in
14 California. Frankly, this Court should be astonished that the first so-called "fact" was
15 even put before this Court. CYBERSitter asserts in the DiPasquale Declaration (and the
16 Amended Complaint) that the official website for the accused software has "download
17 channels" identified by U.S. geographical locations, *e.g.*, "New York", "San
18 Francisco." This is said to demonstrate "targeting" customers in the United
19 States. However, as explained below, CYBERSitter used a *machine-translation* (Google
20 Translate) of the Chinese characters to support this point. In fact, if they had
21 asked *anybody* who reads Chinese rather than a machine to translate the characters for
22 this Court, it would be readily apparent that the Chinese characters, which were
23 submitted to the Court as an attachment to the DiPasquale Declaration, do not even
24 remotely describe or relate to U.S. city names. *The characters instead identify Chinese*
25 *company websites.* The Court will see that CYBERSitter relied on this gaffe to construct
26 its entire theory of Jinhui targeting U.S. customers, both in the Amended Complaint and
27 the DiPasquale Declaration, as well as in its opposition to the Motion to Dismiss.

1 The second so-called factual point argued by CYBERSitter is even more
2 astonishing than the first. CYBERSitter argues that the aforementioned website,
3 allegedly containing the U.S. city names, may after all be a Jinhui website (despite
4 Jinhui's Declaration (Dkt. No. 150-1 at 9) confirming that it does not own or operate the
5 site). What is particularly remarkable about this new assertion is that it contradicts
6 CYBERSitter's own prior assertions to this Court – first in the Amended Complaint
7 which alleges that this website is owned by the government of the People's Republic of
8 China (Dkt. No. 56 at 12), and secondly in opposing dismissal of the PRC under the
9 Foreign Sovereign Immunities Act by arguing that this website is owned by the
10 government of the People's Republic of China and targets end users with its links “for
11 users in New York and San Francisco” (Dkt. No. 100 at 10). Now, with CYBERSitter
12 facing a motion to dismiss from Jinhui, CYBERSitter dramatically shifts position and
13 now suggests to this Court that perhaps it is Jinhui who owns the website in
14 question. The fact is, Jinhui does not own or control the website, the website does not
15 target users in New York and San Francisco, and CYBERSitter has no other “facts” –
16 phantom or otherwise – that allege a contact by Jinhui in this forum.

17 Recognizing the failings of its jurisdictional assertions to show any contact by
18 Jinhui with this forum, CYBERSitter instead diverts attention from the pertinent
19 jurisdictional analyses to a discourse on the merits of its allegations, asserting that its
20 software has been copied and distributed *in China*, and what it thinks it has discovered on
21 Jinhui's server *in China* -- and beseeching this Court to require Jinhui, a company from
22 Gaoxin District, Zhengzhou, Henan Province, China, to travel well beyond its operational
23 limits in China to respond to these allegations on the merits. However, even there,
24 CYBERSitter itself reveals the jurisdictional deficiency as to Jinhui. In its Amended
25 Complaint, CYBERSitter asserts that CYBERSitter distributes its software around the
26 world, including China (Dkt. No. 56 at 10), and now, further, states that it believes its
27 software was stolen *in China*, copied, and distributed to end users *in China* (Dkt. No. 158

1 at 24). Quite simply, CYBERSitter's own words confirm that this Court, sitting in
2 California, lacks personal jurisdiction over defendant Jinhui.

3 In short, CYBERSitter has failed to identify a single fact that demonstrates a
4 purposeful activity by Jinhui in California or conduct aimed at California so as to require
5 this Chinese company to be haled before a Court in California.

6 **II. ARGUMENT**

7 CYBERSitter's Opposition is predicated entirely on conclusory, unsupported and
8 distracting assertions of "purposeful copying", "they stole", "willfully targeted", and
9 "cyber attacks", which, though they might relate to the merits of its allegations, cannot
10 overcome the jurisdictional deficiencies as to Jinhui. CYBERSitter has not submitted any
11 evidence which establishes that Jinhui conducted any activities in California, or conduct
12 expressly aimed at California, much less sufficient contacts to establish personal
13 jurisdiction consistent with notions of fair play and substantial justice. Since it is
14 CYBERSitter's burden to establish the requisite jurisdictional predicates, Jinhui's Motion
15 to dismiss should, therefore, be granted.

16 **A. The Declarations Submitted In Support Of CYBERSitter's**

17 **Opposition Do Not Identify Any Activities By Jinhui In California**

18 There is no evidence of any activities of Jinhui in California presented in the
19 Declarations of Dr. J. Alex Halderman, Brian Milburn, Jenna DiPasquale and Gregory A.
20 Fayer submitted by CYBERSitter in support of its Opposition. In fact, as shown below,
21 the declarations are contradictory in several respects and the DiPasquale Declaration,
22 relying on a defective machine-generated translation offered to this Court, is
23 demonstrably wrong.

24 **1. The Halderman And Milburn Declarations Do Not Identify** 25 **Any Activities By Jinhui In California**

26 In its Opposition, CYBERSitter relies upon a declaration of its witness, Dr.
27 Halderman (Dkt. No. 62), who claims to have examined the accused Green Dam Youth
28 Escort software obtained as a free download from www.lssw365.net, which he asserts is

1 “the official distribution website” referred to in CYBERSitter’s Complaint (Dkt. No. 62
2 at 3; Dkt. No. 56 at 12). Dr. Halderman’s observations about what he obtained from
3 China does not identify or describe any activities conducted by Jinhui in the forum state
4 California or aimed at California. Moreover, even assuming, *arguendo*, that the
5 www.lssw365.net website was a distribution channel for the Green Dam Youth Escort
6 software into California, this does not show that **Jinhui** was distributing the Green Dam
7 Youth Escort software aimed at California because Jinhui does not own or operate the
8 www.lssw365.net website (Dkt. No. 150-1 at 9). Thus, the Halderman Declaration
9 utterly fails to identify any activities by Jinhui in California.

10 CYBERSitter has also submitted two Declarations by Brian Milburn. Dkt. No. 61;
11 Dkt. No. 162. Once again, neither declaration identifies any activities conducted by
12 Jinhui in the forum state California, or aimed at California, and are equally irrelevant to
13 this Motion. The Milburn Declarations contain similar allegations of copying of
14 CYBERSitter’s source code and opinions regarding alleged intentional copying. Like Dr.
15 Halderman’s Declaration, the Milburn Declarations do not allege, let alone offer any
16 evidence to show that Jinhui has any contacts with the forum state California.

17 **2. The DiPasquale Declaration Is Unreliable And Irrelevant**

18 CYBERSitter’s Declaration of Jenna DiPasquale is highly objectionable¹ and
19 irrelevant because, *inter alia*, it contains several misstatements, at least one of which is
20 contradicted by CYBERSitter’s own witnesses and pleadings. For example, Ms.
21 DiPasquale states that the website at www.lssw365.net, which contains links to download
22 Green Dam Youth Escort, “on information and belief . . . belonged to Jinhui.” Dkt. No.
23 160 at 2-3. However, Jinhui does not own or operate this website (Dkt. No. 150-1 at 9),
24 which Dr. Halderman refers to as the “the official distribution website” for Green Dam
25

26 ¹ Jinhui has filed herewith Objections Of Defendant Jinhui Computer System
27 Engineering Ltd. To Declarations In Support Of Plaintiff’s Opposition To Jinhui’s
28 Motion To Dismiss For Lack Of Personal Jurisdiction Pursuant To Rule 12(b)(2).

(Dkt. No. 62 at 3) and CYBERSitter's Amended Complaint alleges is "[t]he Chinese government's official Green Dam site" (Dkt. No. 56 at 12).

CYBERSitter's Opposition Brief also incorrectly states "the English translation [of the website] appears to show a copyright notice for Defendant Jinhui." Dkt. No. 159 at 11. In fact, Exhibit 1 to the DiPasquale Declaration does not show any mention of Jinhui on the www.lssw365.net website. Dkt. No. 160-1 at 3-6. Rather, Exhibit 1 to the DiPasquale Declaration only shows that Jinhui is mentioned on Jinhui's own website, www.zzjinhui.com. Dkt. No. 160-1 at 7. Nor has CYBERSitter shown any content on Jinhui's own website, www.zzjinhui.com, which refers to California or the United States in any way. Dkt. No. 160-1 at 7. In short, CYBERSitter has utterly failed to establish any connection between Jinhui and the distribution of Green Dam Youth Escort software from the www.lssw365.net website.

The DiPasquale Declaration is also disturbing for another reason. This Declaration is relied upon by CYBERSitter for the proposition that the website contains download channels identified by the names of U.S. cities, supposedly targeting consumers in those cities. At the bottom of the evidence presented to the Court on this point is a machine-translation of the webpage from "Google Translate." Dkt. No. 160-1 at 4. As it turns out, the download links actually reference Chinese company websites, not United States city names. Specifically, referring to Exhibit 1 of the DiPasquale Declaration, the Chinese characters, 天极网, actually refer to the name of a Chinese electronics company's website, <http://www.yesky.com/>, not "New York", as translated by Google. See Declaration of Jeffrey Liao ("Liao Decl.") Exs. A-E. The Chinese characters "太平洋电脑网" actually refer to the name of yet another Chinese electronics company's website, <http://www.pconline.com.cn/>, not "Pacific Internet" as translated by Google. See Liao Decl. Exs. A, F-H. CYBERSitter's entire case of targeting customers in the United States is based on the erroneous machine-translations of these nine characters on a Chinese website. Yet even the most superficial analysis of these terms by any reader of Chinese establishes that there is no factual basis in CYBERSitter's assertion.

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1 **3. Facts Concerning Plaintiff's Location And Alleged Harm In**
2 **California As Presented In The Fayer Declaration Are**
3 **Insufficient To The Issue Of Specific Jurisdiction Over A**
4 **Foreign Defendant Having No Contacts In California**

5 CYBERSitter's assertions that it is located in California, owns the software that
6 was purportedly stolen and was damaged in California are not the proper focus of the
7 issue of personal jurisdiction. The law on personal jurisdiction rightly focuses on
8 *defendant's contact with the forum jurisdiction*, directing the Court to carefully consider
9 whether the Defendant has sufficient contacts with the forum for maintenance of the suit
10 in the forum. Further, Ninth Circuit law makes clear that facts about the plaintiff,
11 particularly facts asserted on harm to the hometown plaintiff, however compelling,
12 are not sufficient to sustain a suit against a foreign party who does not have sufficient
13 contacts with the forum and who has not undertaken conduct *expressly aimed* at the
14 forum. See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004),
15 discussed below.

16 CYBERSitter relies (Dkt. No. 159 at 7) on the Fayer Declaration in an attempt to
17 confer specific jurisdiction upon Jinhui based on the argument that a cease and desist
18 letter sent to Jinhui imputed knowledge upon Jinhui of the location of CYBERSitter and
19 harm caused to CYBERSitter in California.² This argument flies in the face of the
20
21

22 ² This cease and desist letter (Dkt. No. 161-2) was never received by Jinhui as it was
23 sent to the wrong address. The address on the letter is No. 68 Shi Wei Hua Road (Dkt.
24 No. 161-2 at 2). Jinhui's address is Huoju Building B, 3rd Floor, 8 Guohuai Street,
25 Gaoxin District, Zhengzhou, Henan Province, China (Dkt. No. 151-1 at 7). Moreover,
26 the letter is written in the English language and Chinese is the first language of all of
27 Jinhui's employees. Declaration of Huiqin Zhao In Support Of Joinder By Defendant
28 Zhengzhou Jinhui Computer System Engineering Co. Ltd. In Motion Of Defendant
Beijing Dazheng Human Language Technology Academy Co., Ltd. To Dismiss Based
On *Forum Non Conveniens* at paragraphs 2 and 8(c) (Dkt. No. 151-1 at 11).

1 notions of fair play and substantial justice and the law of the Ninth Circuit requiring
2 sufficient contacts with the forum to require a foreign defendant to be subject to suit.

3 **B. Jinhui Has Not “Expressly Aimed” At California**

4 CYBERSitter argues that defendants have targeted California because they must
5 know who they are stealing from and they can be imputed with knowing the location of
6 the plaintiff. Dkt. No. 159 at 11-12. CYBERSitter submits its cease and desist letter in
7 an attempt to confirm both of these points. However, these facts are simply not sufficient
8 to establish jurisdiction over a foreign company as a matter of law as explained in
9 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. Cal. 2004). In that
10 case, a defendant Ohio car dealership used the likeness of Arnold Schwarzenegger
11 without authorization in an advertisement that ran in a local Ohio newspaper.
12 Schwarzenegger sued in California, where he resided, but the Ninth Circuit found that
13 California lacked personal jurisdiction over the Ohio car dealership because the use of
14 Schwarzenegger’s image in the local Ohio newspaper advertisements was not targeted at
15 California (374 F.3d at 807) (emphasis supplied):

16 Here, Fred Martin’s intentional act — the creation and publication
17 of the Advertisement — was expressly aimed at Ohio rather than
18 California. The purpose of the Advertisement was to entice
19 Ohioans to buy or lease cars from Fred Martin and, in particular,
20 to ‘terminate’ their current car leases. The Advertisement was
21 never circulated in California, and Fred Martin had no reason to
22 believe that any Californians would see it and pay a visit to the
23 dealership. Fred Martin certainly had no reason to believe that a
24 Californian had a current car lease with Fred Martin that could be
25 ‘terminated’ as recommended in the Advertisement. **It may be**
26 **true that Fred Martin’s intentional act eventually caused**
27 **harm to Schwarzenegger in California, see *infra*, and Fred**
28 **Martin may have known that Schwarzenegger lived in**
California. But this does not confer jurisdiction, for Fred
Martin’s express aim was local. We therefore conclude that the
Advertisement was not expressly aimed at California.

1 Just as the activities by the Ohio car dealership in *Schwarzenegger* did not subject the
2 dealer to jurisdiction in California, Jinhui's business activities and websites, which are
3 exclusively "local" to China and are expressly aimed at China, do not subject it to
4 jurisdiction in California. Dkt. No. 150-1 at 7-9. For this reason alone, CYBERSitter has
5 failed to establish that Jinhui purposefully directed its activities towards California, and
6 thus has failed to establish specific jurisdiction over Jinhui in this forum.

7 The *Brayton* opinion cited (Dkt. No. 159 at 4, 9, 10) by CYBERSitter is consistent,
8 requiring more than alleged harm to the plaintiff and knowledge of plaintiff's location.
9 In *Brayton* the District Court for the Northern District of California had before it a
10 question of personal jurisdiction in circumstances where the defendant – located in the
11 Southern District of California – copied text on the plaintiff's website and published the
12 text on defendant's website in the Southern District of California. The Court held that
13 there was personal jurisdiction in the Northern District of California based on the fact
14 that the defendant was licensed to practice throughout California and its website placed it
15 in "direct competition with [the plaintiff] in Northern California." The allegations here –
16 harm suffered in California and "imputed" knowledge of the location of the harm-
17 suffering plaintiff – simply does not pass the test. Indeed, this Court is no doubt aware of
18 what its docket would look like if personal jurisdiction was based on "you know who
19 you've harmed and you know where we are" letters gratuitously sent by attorneys. In
20 sum, Jinhui does business only in China, with a Chinese language website directed to
21 China, and does not and has not been shown to "expressly aim" itself in any way into this
22 forum.

23 In addition, in apparent recognition that it simply does not have the requisite
24 jurisdictional facts, CYBERSitter asks this Court (Dkt. No. 159 at 8) to take judicial
25 notice of "the fact that California is widely known for being the center of the United
26 States' software industry." Jinhui appreciates that this Court may be rightly proud of its
27 local industry, and accordingly find this assertion appealing. Jinhui also appreciates that
28 CYBERSitter is eager to present its case to a jury pool that shares this same sentiment.

1 However, it is respectfully submitted that the matter of local pride and reputation — that
2 this District as “widely known” as “the center of the United States software industry” —
3 is one of the very matters that the law of personal jurisdiction guards against.

4 The law on this point seeks to ensure fair play and substantial justice with regard to
5 a foreign defendant, directing the Court to refrain from making a defendant appear and
6 defend itself where, as here, the plaintiff wants to present a case against a defendant who
7 is simply not present in the forum. For this reason, Jinhui has filed concurrently herewith
8 an objection to CYBERSitter’s request for judicial notice on the grounds that whether or
9 not California is the center of the U.S. software industry is: (1) irrelevant to determining
10 if Jinhui is subject to personal jurisdiction in this District, and (2) is a vague and
11 subjective statement open to reasonable dispute under Fed. R. Evid. §201.

12 **C. CYBERSitter Has Not Met Its Burden Of Establishing A *Prima***
13 ***Facie* Case Of Specific Jurisdiction**

14 CYBERSitter attempts (Dkt. No. 159 at 12) to turn the burden of proof of
15 establishing personal jurisdiction on its head by neglecting its own burden of establishing
16 sufficient contacts and arguing that “the burden is on the defendant to demonstrate the
17 unreasonableness of the Court asserting jurisdiction.” Before even getting to the burden
18 of demonstrating the unreasonableness of the Court asserting jurisdiction, CYBERSitter
19 must meet its burden of establishing a *prima facie* case of specific jurisdiction. This it
20 has not done.

21 The Ninth Circuit applies “a three-prong test for analyzing a claim of specific
22 personal jurisdiction:

23 (1) The non-resident defendant must purposefully direct his activities or
24 consummate some transaction with the forum or resident thereof; or perform some act by
25 which he purposefully avails himself of the privilege of conducting activities in the
26 forum, thereby invoking the benefits and protections of its laws;

27 (2) the claim must be one which arises out of or relates to the defendant's forum-
28 related activities; and

1 (3) the exercise of jurisdiction must comport with fair play and substantial justice,
2 *i.e.* it must be reasonable.

3 The plaintiff bears the burden of satisfying the first two prongs of the test. **If the**
4 **plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established**
5 **in the forum state.** If the plaintiff succeeds in satisfying both of the first two prongs, the
6 burden then shifts to the defendant to ‘present a compelling case’ that the exercise of
7 jurisdiction would not be reasonable.” *Schwarzenegger*, 374 F.3d at 801-02 (internal
8 citations omitted) (emphasis supplied).

9 As noted above, CYBERSitter has utterly failed to identify any activities by Jinhui
10 that were purposefully directed at California or that purposefully availed itself of the
11 California forum — in short, CYBERSitter has failed to show any contacts between
12 Jinhui and California at all. Accordingly, pursuant to CYBERSitter’s suggestion in its
13 Opposition to Dazheng’s Motion to Dismiss or Stay on Grounds of *Forum Non*
14 *Conveniens* (Dkt. No. 158 at 22), “if this Court finds that Jinhui and Dazheng truly have
15 no dealings with California for purposes of this action, their motion to dismiss for lack of
16 personal jurisdiction should be granted and the case should continue without them (as it
17 did following denial of Sony’s FNC motion).” Because Jinhui clearly has no dealings
18 with California and cannot be reasonably expected to be hauled into Court in this forum
19 to defend itself, Jinhui’s Motion to Dismiss for lack of personal jurisdiction should be
20 granted.

1 **III. CONCLUSION**

2 For the foregoing reasons, CYBERSitter's claims against Jinhui should be
3 dismissed for lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure
4 12(b)(2).

5
6 Dated: July 1, 2011

Respectfully submitted,

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